

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

GIANT EAGLE MARKETS COMPANY¹

Employer

and

Cases 6-UC-438
6-UC-439 and
6-UC-440

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 23, AFL-CIO, CLC

Petitioner

DECISION AND ORDER

Upon petitions duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before Leone P. Paradise, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the Regional Director.²

Upon the entire record in this case³, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The petitions were filed naming Giant Eagle Markets, Inc. as the Employer. Giant Eagle Markets, Inc. is the parent of Giant Eagle Markets Company, the entity which operates retail grocery stores. The units which the Petitioner seeks to clarify are set forth in collective-bargaining agreements between the Petitioner and Giant Eagle Markets Company. The name of the Employer herein is corrected accordingly.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th St., NW., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by March 29, 2002.

³ Both the Employer and the Union timely filed briefs in this matter which have been duly considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. United Food and Commercial Workers International Union, Local 23, AFL-CIO, CLC (herein called "the Union" or "Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

The Employer, a Pennsylvania corporation with its main offices located in Pittsburgh, Pennsylvania, is engaged in the retail sale of groceries at numerous supermarkets in Western Pennsylvania, Ohio, and West Virginia. These supermarkets are either directly owned by the Employer (corporate stores) or operated as franchises (independent stores). For many years, the Union has been recognized as the collective-bargaining representative of certain employees, but not all, of the Employer who work at its corporate grocery stores within the geographical jurisdiction of the Union in one of two multilocation bargaining units: the clerks unit and the meat cutters unit. The current collective-bargaining agreements for these units are effective by their terms, March 1, 1999, to June 20, 2004.

The clerks unit consists of all full-time and regular part-time grocery, bakery and produce department employees in the job classification of clerk, and employees in the job classifications of cigar store manager, assistant produce manager, assistant bakery manager, HBC manager and point of sale manager, employed by the Employer within the geographic jurisdiction of the Union; excluding assistant manager, third person, head of night crew, produce manager, bakery manager, floral manager, photo lab manager, office manager, and video manager and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

The meat cutters unit is comprised of meat department, delicatessen, Chinese food and prepared food employees, and employees in the job classification of assistant deli manager and assistant prepared foods manager employed by the Employer within the geographical jurisdiction of the Union; excluding chief meat cutter, delicatessen manager, prepared foods

manager and Chinese food manager and guards, professional employees and supervisors as defined in the Act.

There are currently 34 corporate stores located in Western Pennsylvania and West Virginia within the geographical jurisdiction of the Union. In addition to these stores, the Employer operates many other corporate stores which are represented by other local unions of the United Food and Commercial Workers International Union whose geographical areas adjoin or even overlap that of the Petitioner.⁴ Employees working at other corporate stores of the Employer located outside the jurisdiction of the Petitioner are not represented by any labor organization.

The Employer, in or about 1996, initiated a new division called Special Occasion Services (SOS). SOS provides catering, event planning and delivery service for customers. Until October 2001, this division operated only in Ohio or in stores represented by United Food and Commercial Workers Local 880. In October 2001, the services provided by SOS began to be implemented at the Petitioner's represented stores with employees designated as special occasion coordinators (SOC) and van drivers performing these services. The SOC's and the van drivers are the subject of the instant petitions.

Thus, the Union, in Cases 6-UC-438 and 6-UC-439, seeks to clarify the clerks unit by adding the SOC and van driver positions to that unit. In Case 6-UC-440, the Union filed the petition to include the SOC position in the meat cutters unit, as an alternative position to its inclusion in the clerks unit.

The Employer, contrary to the Petitioner, contends that the instant petition should be dismissed for various substantive and/or procedural reasons. In this regard, the Employer argues that the SOC's and van drivers do not constitute an accretion to the unit represented by

⁴ Employer corporate stores in Ohio are represented by United Food and Commercial Workers Local 880 as are corporate stores located in New Castle and Hermitage, Pennsylvania. One store in Erie, Pennsylvania, has contracts with the Petitioner and United Food and Commercial Workers Local 1.

the Petitioner since they do not enjoy an overwhelming community of interest with the unit employees. Accordingly, the Employer avers that a clarification proceeding is not the correct procedure to determine the issue of their inclusion.⁵ Intertwined with this contention is the Employer's argument that a proper community of interest analysis cannot be made at this time since only a very few SOCs and van drivers are currently servicing the Western Pennsylvania and West Virginia area. The Employer avers that, by the end of 2002, the number of SOCs and van drivers will have increased dramatically and that operationally the SOCs and van drivers will be assigned not to particular stores but, rather, to zones covering geographical areas encompassing both Petitioner-represented and non-Petitioner-represented stores. Thus, the Employer contends that, procedurally, it would be premature to further process the UC petitions at this time in view of the expanding nature of the SOS operation.⁶ Finally, the Employer avers that the SOCs are supervisors within the meaning of the Act and, thus, should be excluded from the unit on that basis.

As noted, the Employer is a division of the parent corporation, Giant Eagle Markets, Inc. which divides the corporate-owned stores into three divisions: Cleveland Operating Division ("COD"), Columbus Operating Division ("COL") and the Pittsburgh Operating Division ("POD"). The Union represents employees at approximately 34 corporate stores in Pennsylvania and West Virginia, and the Employer and the Union have been parties to successive collective-bargaining agreements for over 40 years, the most recent of which are in effect from March 1,

⁵ The Employer intimates that the issue of the SOCs and van drivers unit inclusion can only be resolved by a petition pursuant to Section 9(c) of the Act seeking either a self-determination election or, perhaps more appropriately, an election where the SOCs and van drivers would be represented in a separate unit or in a residual unit with other classifications of employees who are not included in the clerks or meat cutters unit.

⁶ The Employer also avers that unit clarification cannot be utilized to resolve the inclusion of the SOCs and van drivers in the unit represented by the Petitioner since the work now performed by these employees was, prior to October 2001, work that, to a large extent, was historically performed by non-unit personnel. Thus, the Employer argues that the dispute involved herein is a work assignment dispute which is not the proper subject of a clarification proceeding or is a matter that should have been grieved by the Petitioner prior to the execution of the current collective-bargaining agreement, i.e., unit work being performed by non-unit personnel.

1999 through June 20, 2004. The clerks unit and the meat cutters unit each has its own collective-bargaining agreement, although the dates of the contracts are the same for both units.

As noted, in about 1996, the Employer began to formulate a new department for its retail stores, called Special Occasion Services. This department provides catering, event planning and delivery services for individuals and businesses. The concept that was developed involves an SOC working within the stores, who would meet with the business or the individual and discuss the possible services that the SOS department could provide. The SOC would be expected to market the SOS department services by calling on businesses in the store's vicinity to solicit orders. The SOC would also be available at a kiosk within the store to meet with potential customers. The types of services that could be offered would range from a simple platter of food to elaborate orders involving the products from several departments, such as paper products, floral, bakery, produce, deli, prepared foods and similar products.⁷ Once an order is generated, the SOC would enter the information into a computer and notify each department of the orders required. On the day of the event, the SOC or a driver would pick up the orders at each department, load a company van⁸ with the products, and deliver them to the location of the event.

Jason Cash, Manager of Special Occasions⁹, works at a location outside of Cleveland, Ohio, and is employed by the parent corporation. Reporting to Cash is Jan Davis, COD and

⁷ The SOS department may also provide services for an event which cannot be obtained through the Employer's store, such as providing linens, tables, chairs, and so forth. While this type of service has never been requested by a customer to date, the SOS department is prepared to provide such service if requested.

⁸ The SOS department has a leased van dedicated to use by the SOC and van driver at the Robinson Township store. No other employees ever drive or ride in this van. The van has graphics on its outside which has the Giant Eagle logo and states in large letters "DELIVERS".

⁹ Cash is also referred to as Business Leader, SOS.

COL Team Leader, SOS. A second SOS Team Leader for the POD has not yet been hired.¹⁰ At the present time, there are three SOC's and five van drivers employed in the Cleveland area who report to Davis. There are not yet any SOC's or van drivers in the Columbus area. In the Pittsburgh area, there are presently three SOC's and five van drivers. These eight employees in the POD presently report directly to Cash, but eventually will report to the Team Leader for the POD, once that person is hired. Two of the SOC's and four of the drivers work in the New Castle, Pennsylvania, area in two separate stores.¹¹ One SOC and one van driver work at the Employer's store in Robinson Township, a suburb of Pittsburgh, Pennsylvania. These two individuals are the only SOS department employees who are employed in stores within the jurisdiction of the Union.

The Employer has plans to expand the SOS department significantly by the end of 2002. One major addition will be the hiring of "zone" SOC's. The Employer's plan is to group stores that are in close proximity to each other into zones of approximately two to five stores. Each of these groupings of stores will have a zone SOC. When the expansion of the SOS department is complete, the Employer expects to have 14 zone SOC's in the COD and 19 zone SOC's in the POD.¹² There are no plans to have any zone SOC's in the Columbus division. Presently, the Employer has not hired any of the zone SOC's.

The zone SOC's will oversee the SOC's and van drivers who are employed at stores within their group. They will be responsible for interviewing, hiring, disciplining and assigning

¹⁰ Kim Smith is presently in a position in retail promotions for the Employer, and is expected to be offered the position of SOS Team Leader for the POD.

¹¹ The two stores in New Castle, Pennsylvania, are within the jurisdiction of UFCW Local 880. However, no petitions have been filed to clarify the bargaining units within Local 880's jurisdiction.

¹² The record does not reflect how many of these zone SOC's will be working in the stores within the jurisdiction of the Union. However, inasmuch as the SOS department plans to have SOC's and drivers in independently owned stores as well as corporate stores, it is conceivable that the zone SOC's may oversee employees who are employed at stores within the Union's jurisdiction as well as employees in stores that are not within the Union's jurisdiction.

the SOC's and van drivers within their zone. The zone SOC's will have the authority to assign drivers and/or SOC's to assist on an event from another store. For example, if one store has a very large event to service, the zone SOC may assign a van driver from a different store within the zone to assist in the delivery of the order. The Employer anticipates that, by organizing the stores into zones, it will allow for flexibility in assigning tasks so that the SOS department is run efficiently.¹³ However, as previously stated, while the Employer has not yet hired any zone SOC's, it expects much of the hiring in these positions to be complete by the end of 2002.

The expansion plans for the SOS department also includes the hiring of many more SOC's and van drivers. By the end of 2002, the Employer expects to employ 76 SOC's and 28 van drivers in the Cleveland division; three SOC's and 6 van drivers in the Columbus division, and 65 SOC's and 38 van drivers in the Pittsburgh division. According to Cash, eventually the Employer expects to have SOS department employees in approximately 105 stores, employing about 105 SOC's and about 160 van drivers. Cash expects that 40 to 50 of these SOC's and 80 to 100 of the van drivers will be working in stores within the Union's jurisdiction.¹⁴ The Employer also anticipates that it will eventually hire assistant SOC's in some stores.

As previously described, the Union seeks to clarify either the clerks unit or, in the alternative, the meat cutters unit, to include the classification of SOC. The Union further petitions to clarify the clerks unit to include the van drivers. The Employer, on the other hand, contends that inclusion of these classifications into the existing units is inappropriate and that the two classifications at issue should be excluded from the existing units or the petitions should be dismissed.

¹³ The Employer also anticipates that SOC's and/or van drivers may be moved between stores in different states, i.e., between stores in Ohio and Pennsylvania, as the need arises.

¹⁴ Dale Giovengo, director of human resources for the Employer, estimates that eventually there will be about 90 SOC's company-wide, with about 15 to 20 of the SOC's located in stores within the Union's jurisdiction. Thus, different management personnel have differing views on how many employees will be in the SOS department when it is fully staffed.

Special Occasion Coordinator

The SOC who works at the Robinson Township store is Sandy Williams. As described previously, Williams is the only SOC currently employed in a store that is within the Union's jurisdiction. Williams was hired in July 2001, but spent the first several weeks of her employment observing the operations of the store. Presently, she is on an hourly wage rate, which started at \$8.00 per hour, and is currently \$8.35 per hour. However, the Employer recently decided that Williams will begin to work on a salary of \$21,000.00 per year, plus the potential of \$7,000.00 in bonuses if her sales and performance are satisfactory. This change to salary rather than an hourly rate has been contemplated for several months and will begin soon. Once Williams learned the basic operation of the various departments in the store, she received about two weeks of training, including computer training. Her work as the SOC actually began around the beginning of November 2001.¹⁵

The job qualifications for the SOC position include at least a high school education, although college education is desirable, either retail sales, catering or restaurant experience, and computer skills. In Williams' case, she had worked for Kmart for many years, and had spent 13 years as an office manager at one of the stores. She is very skilled in working on a computer. Williams wears either a dark shirt with the department's logo on it, or she wears "professional" clothing; i.e., dress slacks, suits or dresses.

¹⁵ There were several discrepancies between Williams', Jason Cash's and store director Mike Amodio's testimony relating to the description of Williams' duties, her activities, and the extent of her authority to make decisions regarding herself and Ray Hoffman, the van driver. In this regard, it appears that Amodio does not interact with the SOS employees on a regular basis and thus seems to be unfamiliar with their specific day-to-day activities. Likewise, Cash's description of their activities sometimes differed from Williams' testimony. It appears that Cash does not spend a significant amount of time in the Robinson store, and his testimony appeared to reflect the department's policies, which sometimes seem to differ from the manner in which Williams and Hoffman actually perform their duties. Inasmuch as Williams' testimony is based on her actual experience in performing the duties of the SOC, I am relying on her description of her job in instances where her testimony differs from that of Cash and/or Amodio.

As previously stated, Williams began working full-time as the SOC around the beginning of November 2001. The store has a kiosk which houses a desk and a computer for Williams. Aside from the van driver, no one else in the store works in this kiosk or uses the computer.¹⁶ Williams uses the computer for a variety of tasks in the course of her work. She places the orders on the computer, generates reports for various departments within the store regarding the orders and costs, sends e-mails to Jason Cash and Jan Davis at the SOS main office, receives and processes some online orders, keeps business records of her department activities, generates a schedule for herself and the van driver, develops tally sheets of deliveries, pickups and sales for each department, and makes weekly and monthly reports on her department to Cash.

Williams spends approximately half of her time in the store. In addition to the above-described tasks she performs on the computer, Williams also meets with customers at her kiosk who wish to use her department's services, picks up orders for delivery at various departments, occasionally discusses the upcoming orders with the managers of various departments, and assists the van driver in loading the van for delivery. Although she does not regularly attend management meetings, she did attend one when she was first hired to introduce herself and her new department to the store management.

The other half of Williams's time is spent outside of the store. This time is spent assisting the van driver with deliveries, making deliveries when the van driver is not working, and calling on businesses in the area to solicit business for her department's services. Since she started performing this job at the outset of the holiday season (November and December), Williams only spent about 15 percent of her time cold-calling on potential customers. However, both Williams and Cash anticipate that the amount of her time spent in this pursuit will increase

¹⁶ There was testimony by an employee of the store that, on one occasion, he observed an individual from the corporate office using the SOC's computer. However, this appears to have been an isolated incident.

when business slows down between various holidays.¹⁷ Although it has not yet been necessary, it is also anticipated that there will be occasions where the SOC will need to leave the store premises to obtain items for an order that are not available at the Employer's stores. Williams is authorized to order items from outside vendors if necessary without obtaining approval from anyone else in management.

In generating orders from customers, Williams has a certain amount of discretion to adjust the prices, although she must get approval from the store director to do so. She can also set up credit accounts for customers, and can authorize charges on these accounts prior to final processing by the corporate office. Although she has not yet had the opportunity to do so, Williams can negotiate costs with outside vendors for products and/or services that are unavailable in the Employer's stores.

Williams reports to Cash, and has little interaction with the store director or other management personnel within the Robinson Township store. Williams generates a schedule for herself and the van driver, Ray Hoffman, without any input or oversight by store management. Williams also has the authority to adjust her schedule and that of Hoffman, and to grant time off or require overtime without consulting or even notifying anyone else. Williams has allowed Hoffman, at his request, to change days off, has allowed him to leave early, and has assigned overtime to him during the holiday season when the department was particularly busy.

Before Hoffman was hired, a previous individual, Bartley Kenane, was hired as the van driver. According to Williams, she interviewed Kenane and recommended that he be hired. Within a short time, Williams observed that Kenane's work was unsatisfactory and recommended both to Jan Davis and to the Human Resources Manager within the store that

¹⁷ The busiest times for the SOS department are expected to be Valentine's Day, Easter, graduations, 4th of July, and the November-December holidays season.

Kenane should be removed from the position. Within two days of this recommendation, Kenane was terminated.

Williams has been informed that she will be evaluating Hoffman when the time is appropriate. She has already filled out a monthly evaluation of Hoffman's care of the SOS department van. Hoffman's annual evaluation will have an effect on the amount of wage increase, if any, that he will receive. Williams also has the authority to give Hoffman "Silver Recognition Points" which can be redeemed for prizes and merchandise.

Williams has spent a considerable amount of time assisting and/or filling in for the van driver when he is not working. However, Williams has been informed by Cash that an assistant SOC may be hired in the near future. When this position is filled, Williams' time may be spent differently. Although it has not yet occurred, if an assistant SOC is available to fill in for and to assist the van driver, Williams may well spend more time performing other duties, such as soliciting orders from businesses in the vicinity.

SOS Department Van Driver

Ray Hoffman, the van driver, was hired for this position around November 12, 2001. He took the position previously held by Bartley Kenane, who was terminated. He interviewed with the store's human resources manager, who is his neighbor, as well as with Jan Davis from the corporate SOS office. Sandy Williams sat in on part of the interview, and then oriented Hoffman once he was hired.

Hoffman is assigned to work 32 hours per week, generally eight hours per day. His schedule is determined by Williams based on the orders to be delivered that week. His hours are flexible, and Williams sometimes requires that he start earlier than usual or work later if an order necessitates such changes. During the holiday season, Williams assigned Hoffman to work overtime; one week he worked 48 hours. He presently earns \$8.00 per hour.

Hoffman spends several hours each day in the store. While in the store, he performs a variety of tasks. He is responsible for cleaning and maintaining the van that he drives. Hoffman sits in the kiosk with Williams or in Williams' absence when he has no other job duties to perform. Williams has trained him in some computer skills, and he is able to perform some of the simpler computer tasks for an order. Hoffman has waited on customers who approach the kiosk to place orders. Hoffman has been trained to enter the orders into the computer and to print out the orders for each department. Hoffman then delivers the printed orders to the individual department, usually giving it to the department manager. Other than entering the information for a customer order, Hoffman has not been trained to perform the other computer tasks that are performed by Williams.

When an order is to be delivered, Hoffman often goes to the various departments, such as deli, prepared foods, floral, bakery, and so forth, and picks up the items in the order. He sometimes interacts with the employees in those departments if he cannot find the order by himself. Generally, he, and possibly Williams, load the items in the order into a cart and take the order to the van. He, alone or with Williams, loads the van and drives the order to the location of the customer. Employees from other departments never assist Hoffman in loading the van or delivering the order.¹⁸ Although it could be a part of an order, thus far Hoffman has merely delivered the orders and has never been required to set up before or to clean up after an event.

Hoffman wears a dark shirt and black slacks to work. The shirt has the department's logo, and is a different color than the polo shirts worn by the rest of the store's employees. Because he leaves the store to deliver orders to private homes and businesses, Hoffman, unlike other store employees, wears an identification badge with his photograph on it.

¹⁸ The only individuals who have driven the van are Hoffman, Williams, Amodeo and Paul Abbott, the produce manager.

Hoffman considers Williams to be his direct supervisor, and has little interaction with the store management. According to Hoffman, although it has not yet occurred, if a problem arose while out of the store on a delivery, Hoffman would first call Williams. If Williams were unavailable, he would contact Cash or Davis at the corporate office. Hoffman has never filled in for any other store employees, and was instructed that he was not to perform any work in any other department. He is evaluated by Williams, although this task may well be performed by the zone SOC once that position is filled by the Employer.

Analysis and Conclusions

As stated above, the Union filed the instant petitions requesting that the units be clarified to include the SOC in either the clerks or the meat cutters unit, and the van driver in the clerks unit. The Employer, for a variety of reasons, contends that the SOC and the van driver should be excluded from the existing units, or, alternatively, that the petitions should be dismissed.

The Board has repeatedly followed a restrictive policy with regard to accretions to existing units because the employees who are accreted to an existing unit are not afforded the opportunity to vote in an election to choose their bargaining representative. Compact Video Services, Inc., 284 NLRB 117, 119 (1987); Super Valu Stores, Inc., 283 NLRB 134 (1987). Thus, the Board will find an accretion "...only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted [footnotes omitted]." Compact Video Services, Inc., supra, quoting Safeway Stores, 256 NLRB 918 (1981).

The Board has identified certain factors which are critical to finding an accretion. These factors include interchange of employees; day-to-day supervision of employees; similarity of terms and conditions of employment; similarity of skills and functions; physical, functional and administrative integration; and bargaining history. Compact Video Services, Inc., supra, and

cases cited therein. Further, the Board has stated that two of these factors, the degree of interchange of employees and whether the day-to-day supervision of the employees is the same as in the group to be accreted, are especially important to the finding of an accretion. Towne Ford Sales and Towne Imports, 270 NLRB 311, 312 (1984), and cases cited therein.

In the instant case, with regard to the two particularly significant factors in an analysis of community of interest, the day-to-day supervision of employees and the degree of employee interchange, the record herein does not support a finding of accretion. In this case, the SOC appears to be in charge of her department without any immediate supervision at the store. She receives all instructions and approvals, when needed, from Cash and/or Davis at the SOS department corporate office. Likewise, the van driver receives his day-to-day supervision from the SOC at the present time, although that may change somewhat, once the zone SOC is in place. On the other hand, the employees in the clerks and meat cutters units receive their supervision, on a daily basis, from their department managers and/or the store management. The SOS department employees appear to have little interaction with the store management on a daily basis, as evidenced by store director Mike Amodeo's lack of knowledge about the daily operations of the SOS department and its employees.

Similarly, the unit employees never interchange with the SOC or the van driver. No unit employee has ever filled in for the SOC or the van driver, and the SOS department employees never work in any department other than their own. There have been some isolated and infrequent occasions where a unit employee assisted in bringing an order to the van, or where the store manager has requested the van driver to use the van to pick up an item for the store which is unrelated to the SOS department. However, these instances are not routine and only occur in emergency or unusual situations.

In assessing the other factors relating to a community of interest analysis, the record further indicates that it may not be appropriate to accrete the SOC's and van drivers into a unit represented by the Petitioner by a unit classification proceeding. The terms and conditions of

employment of the SOC and van drivers and the unit employees appear to be different. The SOC will soon be working as a salaried employee. The SOC decides what the hours will be for herself and the van driver which are determined, in part, by the orders and deliveries that week. This contrasts to the regular schedule of shifts worked by the unit employees. The dress requirements for the SOS department are different from that of the unit employees. Further, the SOS department employees have a 30-day probationary period while the unit employees are probationary for 45 days; the SOS department employees are eligible to receive bonuses on a monthly basis, while the unit employees are not; both the SOC and the van driver utilize the computer as part of their normal job duties while the unit employees do not; and the SOS department employees work both in and outside of the store on a regular basis while the unit employees primary locale is within the store.¹⁹

With regard to the similarity of skills and functions, the requirements for the SOC include computer skills and experience in either sales, catering or restaurant work. While a college education is not required, it is desirable for the SOC position. These are not the requirements for the unit employees. As previously stated, the SOC and the van driver are away from the store for a part of their time on a regular basis. Except in unusual circumstances, the unit employees perform all of their job duties at the store.

With regard to physical, functional or administrative integration, there is insufficient evidence to show a community of interest between the SOS employees and the unit employees. The SOS employees report directly to Jason Cash at the corporate offices in Ohio. The SOC and the van driver work, when in the store, at the SOS department kiosk, and only deal with other departments to deliver the printouts with orders and then to pick up the items prepared by

¹⁹ As pointed out in the Union's brief, there have been occasions where a unit employee has been assigned to leave the store, often in a private vehicle, to buy some item needed at the store for a display or other reason, or to pick up or deliver an item to another store. However, these instances are sporadic at best and are clearly not part of the unit employees' normal routine. On the other hand, the SOC and the van driver are required to leave the store regularly as part of their job duties.

the various departments for the orders. As discussed previously, the job duties of the van driver and the SOC require that they leave the store on a regular basis to deliver orders, solicit new customers and, possibly in the future, to gather orders that are being supplied by outside vendors. The driver's work also involves vehicle maintenance, and the SOC's work involves a large amount of computer generated reports, record-keeping and communication with the corporate offices. The unit employees have none of the above-described job duties.

With regard to bargaining history, the positions of SOC and van driver were only implemented in the second half of 2001, so the issue has never come up in negotiations. However, there are other departments which have been developed in the last several years which were either agreed to or found to be appropriately outside of the two bargaining units. These include pharmacy employees, cell phone sales kiosk workers, photography department employees and day care center workers.

Altogether, and noting that the two especially important factors are not found herein, it appears that the SOC and the van driver would not be found to share an overwhelming community of interest with existing unit employee classifications, as required in an accretion.

In addition to its argument involving a lack of community of interest, the Employer has also asserted that the SOC is a supervisor within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has been frequently required to resolve issues involving the supervisory status of persons whose status is unclear, and each case turns upon the particular facts involved therein. The United States Supreme Court and the Board have noted that the

legislative history of Section 2(11) of the Act reveals that Congress intentionally distinguished between “straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.”

NLRB v. Bell Aerospace Company, 416 U.S. 267, 280-281 (1974).

In order for an individual to be found to be a supervisor within the meaning of the Act, the individual must be vested with more than a title and the theoretical power to perform one or more of the functions enumerated in Section 2(11) of the Act. In addition, it must be shown that such power is exercised with independent judgment on behalf of management, and not in a routine, clerical, perfunctory or sporadic manner. Chicago Metallic Corp., 273 NLRB 1677 (1985). The Board and the courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740, 741 (1997). Further, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. Bowne of Houston, Inc., 280 NLRB 1222, 1224 (1986).

In the case of the SOC, it appears from the record that, thus far, Williams has exercised at least some of the indicia of supervisory status. Williams testified that she interviewed and recommended that the first van driver, Bartley Kenane, be hired, and similarly recommended that he be fired. Williams also appears to have the authority to recommend discipline for the van driver, and can authorize him to leave early, to take a day off, to change his schedule, and to work overtime, without needing to obtain the approval of anyone else in management. She has evaluated Hoffman with regard to vehicle maintenance, and is planning to write his annual evaluation as well. These evaluations can determine whether or not the driver will receive a bonus and/or wage raise.

However, the record at this time only reflects the work of one SOC and one van driver in one of the Employer's stores for only a few months. As pointed out by both the Employer and the Union in their briefs, the Employer has plans to greatly expand this department in the very near future. At the present time, there are only six SOC's and ten van drivers in the Employer's entire operation. Within the next year, this number is to increase to over 100 SOC's and over 160 van drivers.²⁰ In addition, the Employer plans to hire assistant SOC's and zone SOC's as part of this department. Many of these new positions will be assigned to stores within the jurisdiction of the Union.

If the Employer follows through with its plans, the duties and authority of both the SOC and the van driver could change significantly. For example, if an assistant SOC is hired at the Robinson store, the job duties of the SOC and the van driver may well change. It is too speculative to attempt to describe how their jobs might change with the addition of this position, but it is conceivable that the presence of an assistant SOC might reduce the amount of time the driver and the SOC fill in for each other.

Perhaps more significantly, the addition of the zone SOC's could dramatically reduce the indicia of supervisory authority currently held by Williams. According to the plans, the zone SOC's will be responsible for hiring, firing, discipline and scheduling of the SOC's and the van drivers employed within each zone. Consequently, my analysis of the supervisory indicia presently held by Williams may be inapplicable if the zone SOC's, in fact, are given the supervisory duties that are expected to be moved to that position. However, since no zone SOC's or assistant SOC's have been hired yet, it is impossible to predict how the duties and responsibilities of the SOC's and van drivers will change, if they do change.

Consequently, I find that, based on the present record, it would be premature to decide at this time whether or not the SOC and/or the van driver should be accreted into the clerks unit

²⁰ As previously explained, the projected number of SOC's and van drivers varied greatly between exhibits and testimony of various management personnel.

or the meat cutters unit.²¹ The SOS department is still in its earliest stage of development, and only has two employees currently employed in a department which could have close to 100 employees in stores within the Union's jurisdiction in a very short time. As described above, at the present time and based on the instant record, it appears that the SOC possesses supervisory authority within the meaning of Section 2(11) of the Act, and it also appears that the SOC and the van driver do not share such an overwhelming community of interest with the unit employees so as to require a finding of an accretion.²² But because this initial review of these job classifications is based on only one employee in each classification for a very short period of time, and the Employer has plans to greatly expand the department and possibly change the job duties significantly if and when the assistant SOC's and the zone SOC's are in place, the instant record appears to be inadequate to make a finding on the petitions herein at this time. Thus, I find that, based on the record herein, the instant petitions are premature and, therefore, I shall dismiss the three petitions herein.

²¹ In fact, many of the arguments raised by the Union in its brief relate to the short amount of time during which the SOC and the driver have been performing their duties. For example, the Union argues that, while the Employer asserts that much of the SOC's time will be spent soliciting new customers by calling on them at their places of business, the record to date reflects that the SOC has only performed this job duty a small percentage of the time. I note that this is an excellent example of the inadequacy of the record to date. The SOC has only been performing this job since about November 2001, and immediately became involved with the holiday season. It is quite possible that, once the holiday season ends, and particularly if an assistant SOC and/or zone SOC's are hired, the SOC may or may not spend more time calling on potential customers. However, no one will know how and if the SOC's job duties will change over the next year. As stated herein, I find it premature to make a decision about the accretion of the SOC and/or the van driver for exactly this reason.

²² As noted in its brief, the Employer raises some other arguments regarding its position that the SOC and the van driver should not be accreted into either of the existing units. Some of these arguments include that a unit clarification is inappropriate because the work involved has historically been performed by non-bargaining unit employees; that the petitions are disruptive of the collective-bargaining process; that the issues involved in these petitions are really work assignment disputes; that the petitions are not directed to the appropriate residual unit; and that accretion is inappropriate under Board rules regarding expanding units. At this time, I find it unnecessary to address all of these arguments in the instant decision inasmuch as I have found the petitions to be premature. Should the Union file future petitions regarding the SOS department employees, the Employer will have the opportunity to raise these arguments once more if it so chooses.

ORDER

IT IS HEREBY ORDERED that the petitions in Cases 6-UC-438, 6-UC-439 and 6-UC-440 filed herein be, and they hereby are, dismissed.

Dated this 15th day of March 2002.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

385-7500-0000-0000
385-7553-2060-0000